A. KANAPATHI PILLAY v. JOSEPH CHONG

[F.C. (Raja Azlan Shah C.J., Syed Othman & Salleh Abas F.JJ.) October 2, 1980]

[Kuala Lumpur — Federal Court Civil Appeal No. 141 of 1979]

Land Law — Agreement for sale of land — Transfer of land — Option to vendor to repurchase land — Option only contractual — Right not exercised — Whether transfer made pursuant to moneylending transaction.

In this case the appellant who was in need of money to prevent a foreclosure action against his land agreed to sell it to the respondent. There was an option for the appellant to repurchase the land at an enhanced price. This option was not exercised within the time provided. The land was transferred to the respondent who subsequently agreed to sell the land to a developer. The appellant thereupon brought an action for the recovery of the land. It was argued that (a) the transfer of the land was made pursuant to a moneylending transaction and as the respondent was an unlicensed moneylender the transaction was illegal and of no effect; (b) that the respondent held the land in trust for the appellant because of the option given to repurchase the land. The learned trial judge held that the land had in fact been sold and had not been transferred on trust. He dismissed the claim of the appellants, who thereupon appealed to the Federal Court.

Held: (1) there was no evidence to show that the respondent was a moneylender;

(2) the documents and the subsequent conduct of the parties show that the transaction was intended to be a sale and not a loan;

(3) the option to purchase was only contractual and as the right was not exercised, the appellant could not succeed in his claim.

Cases referred to:-

(1) *Ngui Mui Khin & Anor.* v. *Gillespie Bros. & Co. Ltd.* [1980] 2 M.L.J. 9.

(2) *Yeep Mooi* v. *Chu Chin Chua* [1981] 1 M.L.J. 14.

(3) *Haji Abdul Rahman* v. *Mohamed Hassan* [1917] A.C. 209.

(4) *Wong See Leng* v. *Saraswathy Ammal* [1954] M.L.J. 141.

(5) *Yaacob bin Lebai Jusoh* v. *Hamisah binte Said* [1950] M.L.J. 255.

(6) *Soar* v. *Ashwell* [1893] 2 Q.B. 390, 392.

(7) *In re Schebsman* [1944] 1 Ch. 83, 104.

FEDERAL COURT CIVIL APPEAL.

S. Kulasegaran for the appellant.

S.D.K. Peddie for the respondent.

Cur. Adv. Vult.

Salleh Abas F.J. (delivering the judgment of the Court): This is an appeal from the decision of Wan Hamzah J. dismissing the appellant's suit in connection with the transfer of his land held under Certificate of Title No. 1045 Lot 34 Section 69 Town of Kuala Lumpur to the respondent on January 28, 1965. We heard the appeal at our regular sitting in Kuala Lumpur on October 2, 1980 and after hearing submissions of both parties we dismissed it with costs. Here are our reasons for doing so.

The appellant was the owner of the land. In early 1965, he was in need of money in order to prevent a foreclosure action which was about to be taken against the land. He then approached the respondent through the assistance of two brokers, Yuen Fatt (PW2) and Foo Koon Seng (DW2). After an oral agreement was reached, the appellant contacted his solicitors M/s. D.P. Xavier & Thambiah who after taking instructions wrote to the respondent enquiring about the terms of the agreement. In reply thereto the respondent wrote a letter setting out in detail the terms of the agreement and asked the appellant to sign on the letter if he agreed with the terms. That was done and the appellant's solicitors wrote a reply to this letter confirming the appellant's agreement. The terms are contained in Exhibit D2/2 which are as follows:

Joseph K. L. Chong
Chong & Company
Kuala Lumpur 14th January 1965.

Bilangan Surat Kami JC/P/65
Bilangan Surat Tuan

Messrs. D.P. Xavier & Thambiah,
Advocates & Solicitors,
No. 4 Klyne Street,
Kuala Lumpur.

Dear Sirs,

In reply to your letter dated 12th January 1965 and with reference to our conversation over the telephone, I am to write as follows,—

1. The agreed purchase price of the land under certificate of title No. 10452, Lot No. 340, section 61 in the town of Kuala Lumpur in the District of Kuala Lumpur shall be $36,000.00.
2. I enclose herewith a cheque for $36,000.00 as full payment for the said land. This sum of $36,000.00 is to be retained by you until the transfer of the title of the abovementioned land is completed and the title delivered to me. After the transfer of the land to me free from any charge whatsoever and the delivery of the certificate of title to me, you may release the sum of $36,000.00 deposited with you to the vendor, Mr. A. Kanapathi Pillai.
3. I shall be willing to grant Mr. A. K. Pillai an option to purchase the said land on 19th July 1965 for $37,100.00.
4. In consideration of the option granted to Mr. A. K. Pillai, I shall be willing to allow Mr. Pillai to file a caveat on the above said property.
5. Mr. A. K. Pillai is required to sign a document now to release the caveat, if any, on 20th July, 1965.
6. Mr. A. K. Pillai is required to pay me $30.00 per month as rental for the occupation of the house now occupied by him commencing on 1st February 1965. Mr. A. K. Pillai shall be required to write to all the tenants (a copy of each letter is to be sent to me) on the said land, telling them that I have bought the said land and that all rent due and payable on 1st February, 1965 shall be payable to me or my authorised representative.

It is expressly understood that Mr. A. K. Pillai and you accept the foregoing conditions and I shall be much obliged if you will sign the duplicate of this letter indicating your acceptance, and that all legal fees shall be paid by Mr. A K. Pillai.

Yours faithfully,
Sgd:
JOSEPH K.L. CHONG.

Accepted,

A. Kanapathi Pillai.

As a result of this agreement the land was transferred to the respondent on January 18, 1965 and the option to repurchase the land was given to the appellant on February 15, 1965 at a repurchase price of $37,500. This price was later altered to $38,500 in order to take into account another sum of $1,000 passed over by the respondent to the appellant.

Subsequently the respondent notified Kuala Lumpur Municipality of the change of ownership of the

land whilst the appellant in compliance with the terms of the agreement notified the tenants living on the land that the appellant then became the owner to whom rents ought to be paid.

The respondent received rents from the time through the appellant and made an application for subdivision of the land to the Land Office and another application to the Municipality for planning permission to build terrace houses on the land. These applications were rejected. Later the respondent obtained approval for building a four storey block of flats. In 1968, he charged the land to the Public Bank in return for over-draft facilities and on September 2, 1972 he sold the land to M/s. Ban Guan Seng Sendirian Berhad (herein referred to as the "developer") at $15 per sq. ft. After this the respondent notified all the tenants to quit the land as the land was needed for development.

It was after this sale that the appellant began to assert his right in the land. Under the agreement with the respondent he was entitled to enter a caveat against the land in order to protect his option to re-purchase. He, however, did neither lodge the caveat nor exercise the option; but after the respondent had sold the land to the developer he lodged the caveat on February 27, 1973 for the first time claiming that he was its beneficial owner. He wrote a letter to the developer requiring the latter to pay the balance of the purchase price to him. Finally on December 3, 1975 through a different firm of solicitors, M/s. Pasupathy & Company, he wrote to the respondent alleging that the transfer of his land to the respondent was merely as a security for a loan and that as he had already paid-up the principal and interest from time to time the respondent was required to transfer back the land to him within seven days otherwise a legal action would be taken. The respondent promptly denied the allegations in this letter (D2/69). Finally the appellant started a civil suit against the respondent on February 25, 1976 and the trial was held before Wan Hamzah J.

There are only two issues raised in this case. The first issue is whether the transfer of the land to the respondent on January 28, 1965 was made pursuant to a money-lending transaction and if so whether the respondent was an unlicensed money-lender so that the transaction and transfer were illegal and of no effect by virtue of Moneylenders Act, 1951. He therefore prayed for an Order to set aside the transfer so made. The second issue which is really an alternative one is whether the respondent as a result of the said transfer held the land on trust for the appellant; the trust having been created by virtue of the fact that the respondent had given an option to re-purchase the land to the appellant and that as time was not the essence of the contract the appellant was entitled presumably to exercise this option. The prayer asked for in respect of this issue is an Order to compel the respondent to re-convey the land to the appellant and also for damages for breach of trust by charging the land to the Public Bank and subsequently selling it to the developer. The learned judge in his careful judgment stated "I find that the plaintiff (appellant) had in fact sold the land to the defendant (respondent), and it had not been transferred on trust but absolutely free from encumbrances." In our opinion the finding of the learned judge is unimpeachable and as such we dismissed the appeal.

The first issue

To succeed on the first issue, i.e. whether the transfer of the land to the respondent contravened the Moneylenders Act, 1951 the appellant had to prove the following two facts, namely:—

1. That the agreement between him and the respondent which led to the impunged transfer was a money-lending transaction; and
2. That the respondent was an unlicensed money-lender.

To take the second fact first for the sake of convenience, we find that there is not an iota of evidence to show that respondent was a money-lender. He was and still is a public accountant practising under a firm name of Joseph K.L. Chong & Company. There is no evidence to show that he was carrying on a business of lending money nor is there any evidence to show that he had lent money to other people. The allegation that he was a money-lender is simply confined to the transactions between him and the appellant, which he maintained but was denied by the respondent to be a loan. We will deal with this point in the next paragraph of the judgment but for the time being we wish to say that even if the transactions between them were held to be a loan, they are not to be struck down under the Moneylenders Act because the respondent was not a money-lender within the meaning of the Act for the reasons stated above. There is simply no evidence to prove this. (see *Ngui Mui Khin & Anor.* v. *Gillespie Bros. & Co. Ltd.*[1] and *Yeep Mooi* v. *Chu Chin Chua*[2]).

We now come to consider whether the learned judge was correct in holding that the transactions between the appellant and the respondent were not a loan transaction.

In this case there is a mass of documents produced by both sides. The appellant gave oral evidence trying to get around the documents, and called his witness, Yuen Fatt (PW2) to support him. It seems to us that, even by looking at the cold points of the Record of Appeal, their evidence was so unreliable and so extravagantly reckless that no reasonable person could be expected to believe them. The learned judge in our view was correct in rejecting their evidence and preferred instead to rest his decision on documents which speak for themselves. The review of all these documents clearly shows that the respondent was the owner of the land as a result of the transfer. Applications to subdivide the land and for planning permissions, receipts for the payment of assessments to the Municipality, and notices issued to the tenants living on the land to quit the same and even receipts of rents collected from them were all written in the name of the respondent as the owner. Quit rent receipts were in the name of the respondent and kept by him until produced in court as exhibits. There is abundant evidence that in cases where the appellant paid the assessment appropriate deductions

were subsequently made by him from the rents which he collected from the tenants before passing over the remainder to the respondent. Thus there is no doubt at all that the respondent was the owner and intended to be the owner of the land.

The question whether the transactions between them were a loan or a sale transaction in our view, must eventually depend upon their intention which can be gathered from these documents. From exhibit D2(2) it is clear that the land was intended to be sold to the respondent for thirty six thousand dollars but the appellant was given a right to repurchase it until July 19, 1965, i.e. within six months, for thirty seven thousand five hundred dollars. There is nothing in this exhibit or any other documents which indicate either expressly or impliedly that the land was security for which the sum of thirty six thousand dollars was the loan. Mr. Xavier (PW1) who was then acting for the appellant said that the exhibit D2(1) sets out accurately and fully the instruction which he received from the appellant. This exhibit clearly shows that the land was sold to the respondent for $36,000 with a right given to the appellant to repurchase it and to file a caveat till the expiry of the option period. It was in reply to this letter that the respondent set out in detail the terms of their agreement in exhibit D2(2) which was subsequently confirmed by the appellant in exhibit D2(3).

Counsel for the appellant submitted that the transactions must have been a loan transaction because of the continued occupation of the land by the appellant. In our view this submission over-looked the fact that the continuing occupation of the land by the appellant was not as a landlord but as one of the tenants. As a result of the transfer he agreed to pay $30 monthly rental to the respondent and to notify other tenants to pay their rents to the respondent or his authorised representative. Counsel for the appellant also submitted that the transactions must have been a loan transaction because at the material time the appellant was in dire need of money in order to prevent the land from being foreclosed by a chargee to whom the land was then charged. In our view, the financial position of the appellant is neither here nor there because the terms of the agreement between him and the respondent which were reduced into writing speak nothing of loan but sale. It would be a strange conclusion of law if we agree with the submission that a sale becomes a loan simply because the vendor was in need of money at the time of the sale.

To prove that the transactions were a loan the appellant was driven to allege that he paid interest to the respondent from time to time from the date of the transfer of the land to the respondent to the date of the sale by the latter to the developer. But the sums which he alleged were paid as interest were fully receipted as rents. Here again the appellant's allegations were contrary to the documents. The receipts for these various sums of money were issued by the respondent in the names of individual tenants living on the land, and there is evidence to show that the appellant was living together with one of them as a subtenant. A number of rough statements of accounts pertaining to the rents prepared by the appellant were produced at the trial. There is nothing in any of these documents which indicate that the sums paid as rents were in fact interest on the loan. Further it is unbelievable that these sums were interest because the first time he raised the question of interest was on December 3, 1975, in a letter written by his solicitors, requiring the respondent to retransfer the land to him. In our view the allegations remained unproved.

The option to repurchase the land (exhibit P4), was given to the appellant on February 15, 1965. The repurchase price was then agreed to be at $37,500. The figure $37,100 stated in exhibit D2(2) as the agreed repurchase price was a typographical error. It was meant to be $37,500 as stated in the option exhibit P4. This amount was subsequently crossed out and a figure of $38,500 was substituted therefor. The alteration and the initials of the respondent for it were done in ink of a colour different from that of his signature on the option (P4). This clearly shows that the alteration was made on a later date than the date on which the option was given. Both the appellant and the respondent agreed that the increase of the repurchase price from $37,500 to $38,500 was to take into account another sum of $1000 given by the respondent to the appellant. But they disagreed as to the nature, purpose and time of the payment of this sum of $1000. According to the appellant, he received the sum as loan on the date of the option and used the money for paying his brokers Yuen Fatt (PW2) and Foo Koon Seng (DW2) $500 each as their commissions for arranging the loan from the respondent. To support his evidence the appellant produced a document P3 which purported to be a receipt of five hundred dollars signed by Yuen Fatt bearing the same date as the date of the option. Yuen Fatt also gave evidence relating to the issue of this receipt and also relating to this transaction. By looking at the option (Exhibit P4) it is obvious that the alterations which increased the repurchase price to account for the disputed sum of $1000, because of the different colour of ink used, were not done on the date when the option Exhibit P4 was given. They must have been done on a later occasion. The respondent maintained that the cheque for $1000 was not given to the appellant on February 15 but on March 22, 1965, nor was it given as a loan to the appellant for the purpose of paying Yuen Fatt or Foo Koon Seng, but for the purpose of cleaning the land and repairing the building on it. He produced the cheque in question together with its butt (D34 and D35). This cheque which was an Overseas Union Bank cheque No. 556144 dated March 22, 1965 was presented for payment by the appellant on the same date. The butt of the cheque (D35) had a note to the effect that the money was for repair of buildings and cleaning the land. Since the appellant was paid a sum of $1000 by the respondent only once, the production of the cheque and its counterfoil is a conclusive proof that the money was not a loan and that it was only received by the appellant on March 22, 1965 and not earlier. If the appellant had used this money for purpose of paying commissions to his brokers he could only do so on or after March 22 and not earlier; and certainly not on February 15, 1965. Further it is significant that the appellant did not take any receipt from Foo Koon Seng (DW2), who also admitted having received a commission of

$500. If the appellant was so meticulous as to ask Yuen Fatt to issue a receipt, he should also ask for a similar receipt from Foo Koon Seng. The fact that he did not do so clearly shows that the receipt (P3) was made for a very special purpose. In the circumstances we agree with the finding of the learned judge that the receipt signed by Yuen Fatt purporting to say that he received the commission February 15 was a fabrication. It was introduced purely to show that the sum of $1,000 was a second loan. Because the receipt was rejected as a false one, it follows that the appellant's evidence relating to the receipt by him of the sum of $1,000 remained completely unreliable.

The agreed repurchase price of thirty eight thousand five hundred dollars, according to the appellant, consisted of thirty six thousand dollars being the first loan, another one thousand being the second loan (which we have already discussed), and the remaining sum of one thousand five hundred being a pure gift to the respondent for giving the loan quickly. It is really curious that the appellant did not say that the sum of one thousand five hundred dollars was an interest inspite of his allegations that the transactions between him and the respondent were a loan. If the purchase price stated in the terms of the agreement (D2(2)) was a loan, surely the difference between the purchase price and the repurchase price should logically be interest. However since the difference of one thousand five hundred was not interest, it must have been a profit which the respondent would have earned if the appellant had exercised his option to repurchase the land. Thus, that being the case, under no circumstances could we hold that the transactions between the appellant and respondent were a loan of money.

It was also submitted that an option to purchase back the land should give rise to an inference that the sale to the respondent must be a loan transaction. In our view no such inference could be made here because the documents and the subsequent conduct of the parties show that the transaction was intended to be a sale and not a loan. This brings us to the second issue.

Second Issue

It was contended by the appellant that the option to repurchase the land (P4) created a trust in his favour thereby making him beneficial owner and as such he was entitled to call upon the respondent to re-transfer the land at any time he chose to do so. In other words the option to repurchase gave him an equitable interest in the land. In our view the submission is contrary to the Privy Council's ruling in *Haji Abdul Rahman* v. *Mohd. Hassan*[3] and the Federation of Malaya Court of Appeal's decision in *Wong See Leng* v. *Saraswathy Ammal.*[4] At the time when the transactions between the appellant and the respondent took place, the National Land Code was not yet brought into force. The Code came into force on January 1, 1966 (L.N. 474/65). The law in force then was the F.M.S. Land Code (Cap. 138). However even if the matter between the parties fell to be decided under the National Land Code on the question of charge there is no significant change made in the law so as to detract from the value of the two cases cited above. According to those cases an option to repurchase given by the purchaser does not create any equitable interest in the land for the vendor. It is certainly not a charge as it is not in accordance with statutory requirements. Such option only creates a contractual right which can be defeated by the effluxion of time or Statute of Limitation. However soon after the end of the Japanese occupation the court in this country probably swayed by sympathies at the prospect of borrowers having to lose their lands on account of loans which they received in worthless Japanese currencies during the occupation period held in a number of cases, notably in *Yaacob bin Lebai Jusoh* v. *Hamisah binti Said*[5] that an option to repurchase was in the nature of a common law mortgage. The court likened it to an equity of redemption which could be redeemed at any time. This ruling was completely contrary to the Privy Council's decision in *Haji Abdul Rahman's* case but the matter was put right subsequently in *Wong See Leng's* case. The position today it seems, is that it requires legislation to amend the National Land Code, if the rule established in these cases is to be overruled.

As the option to repurchase is only contractual and as the right was not exercised at all, we are of the view that the appellant had nothing to complain. He did not even bother to protect it by a caveat. The caveat which he lodged on July 23, 1973 was so far out of time, misconceived and of no use at all, as it attempted to protect an equitable interest which he never had.

We wish to reiterate here that the relationship between the parties was purely governed by the terms of the agreement which they agreed on January 14, 1965. There is nothing in the language of this agreement which was reduced into writing in a set of three letters (Exhibits D2(1), (2) and (3) and in the circumstances of the case which indicates that a trust was intended. The matter is purely contractual. (*Soar* v. *Ashwell*[6] and *In re Schebsman*[7]). In the circumstances there is no question of acceding to the appellant's prayer that the land be re-conveyed to him nor for damages for breach of trust. The respondent as the owner was completely entitled to deal with the land as he liked. He owed no obligation to the appellant when charging the land to the Public Bank and also when selling the same to the developer.

Thus in our judgment the learned judge was right in dismissing the suit and we consequently dismissed this appeal with costs.

Appeal dismissed.

Solicitors: *Ranjit, Thomas & Kula; Skrine & Co.*